NO. A-638

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR

TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Petitioner's Motion for Stay of Execution

PETITIONER'S SUPPLEMENTAL MOTION FOR STAY OF EXECUTION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner, Thomas A. Barefoot, files this Supplemental Motion for Stay of Execution, which is presently scheduled for sometime before sunrise on January 25, 1983.

I

NATURE OF THE CASE

The nature of the case is detailed in both Petitioner's original Motion for Stay of Execution and Respondent's Response to the Motion already on file with the Court.

II

PROCEDURAL HISTORY OF THE CASE

The procedural history of the case is also detailed in both of the above instruments.

III

STATEMENT OF FACTS

A. MARY RICHARDS' TRIAL AND DEPOSITION TESTIMONY.

The Court of Appeals summarily dismissed Mary Richards' sworn statement, made to petitioner's lawyers and transcribed by a court reporter on December 27, 1982, based upon the following analysis [Opinion, p-13-14]:

1. No rational prosecutor would have called Richards as a witness if she had told him what she now says she did.

2. Her testimony was not important, to begin with.

3. Her testimony of hearing two shots raised an inconsistency because the other evidence, including that of an eye witness to the shooting, was that only one shot was fired.

4. With the strong identification of Barefoot by the other witnesses, to place Mary Richards on the stand if she thought she had seen a different man, would have only contributed another inconsistency.

5. No attorney would have thought she could survive non-leading direct testimony and the cross-examination with only "yes" or "no."

6. If she had told "everybody" and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense.

7. Petitioner's presence at the scene was clearly established. [emphasis added].

The respondent argues, page 4 of his Response to the Motion for Stay of Execution by this Court, that the Court of Appeals correctly reasoned that the prior opinions by the Court, cited by the dissenters in Brooks v. Estelle, --- U.S.. --- (51 U.S. L.W. 3469 (December 6, 1982), "stand for the proposition that Petitioner is entitled only to a careful, reasoned disposition of the merits of his claims, after opportunity to brief those claims. The opinion of the Court of Appeals below reflects precisely such careful consideration, albeit in the procedural context of a motion to stay execution."

Not so. Petitioner was notified by telephone on the afternoon of January 17, 1983, that the Court of Appeals had set this cause for argument at 9:00 a.m., on January 19, 1983. Letter notification of this setting was received by petitioner's lawyers on January 20, 1983 -- after the Court had already denied his Motion for Stay of Execution. Petitioner has not yet had an adequate opportunity to brief his claims.

The right to an appeal, where the habeas court has issued a certificate of probable cause, cannot be lightly dismissed with the assertion his claims were considered in the "procedural context of a Motion to Stay Execution."

A Motion to Stay Execution, even under an expansive reading of Brooks, cannot and should not stand for the proposition that a petitioner's is "entitled only to a careful, reasoned

disposition of the merits of his claims" under the truncated procedure applied to such proceeding. There can be no "careful, reasoned disposition of the merits" where petitioner is allowed less than 36 hours to file a brief based upon (1) newly discovered evidence involving both prosecutorial misconduct and suppression of evidence, (2) evidence requiring an analysis and briefing of a trial record encompassing 1600 pages; (3) although the Court reporter furnished a copy of the habeas evidentiary proceedings to the respondent on January 14, 1983, he has never furnished a copy of this matter to the indigent petitioner; (4) petitioner received an illegible copy of the habeas proceedings, furnished by respondent's counsel, on the morning of January, 21, 1983; (5) because of the absence of the habeas record the petitioner was unable to respond to the out-of-context statements and misstatements of the evidence made by respondent both in oral argument and in his response before the Court of Appeals, and had to rely solely upon his lawyer's recollection of that testimony and evidence.

Any in-depth evaluation of Richards' present testimony, not as it relates to "a careful, reasoned disposition of the merits of his claims," but as to whether it constitutes the showing of a "substantial" question as required by Brooks, supra, and O'Bryan v. Estelle, --- F.2d --- , slip opinion 638, requires a detailed evaluation of the other trial testimony. An examination of the record clearly reveals that the Court of Appeals either decided the appeal on the merits, without a detailed examination of the trial record, or applied a more stringent test than that required by Brooks and O'Bryan.

The critical impact that Mary Richard's testimony may have had upon the jury must be judged from the effect that her false testimony had upon the State's identification of the "killer."

Five essentially "unbiased" identification witnesses testified at the trial. Their testimony is essential to a determination of the substantiality of the question raised by Richard's tentative in-court identification of Barefoot, where her truthful testimony would have been "that is not the man I saw run down Valley Road from Amy after the shots were fired. Barefoot is not the man."

The jury heard from an accomplice witness and one other impartial witness. An outline of the identification testimony crystalized the issues.

1. JOHN EDWARDS (Direct, R. 1158-1202; 1213-12181. Cross R. 1203-1213.

   a. DIRECT: Edwards, a Ft. Hood soldier made a positive in-court identification of Barefoot as the man he saw near the scene of the fire at the Silver Spur and who ran from the fire, across highway 190, towards Amy.

   b. CROSS: Edwards admitted he had talked with defense counsel only in the office of and in the presence of the District Attorney. He refused to discuss the case with them otherwise. Any prior statements were unavailable to the defense until completion of direct examination.

   Edwards was impeached on cross-examination by a prior inconsistent statement given to law enforcement authorities August 7, 1978, (R.1206, 1207) hours

after the shooting, describing the "man at the fire" as:

1. Tall, 6 foot to 6'2"
2. Short, military haircut
3. Clean Shaven(1207)
4. Medium to slender body build

In the August 7, 1978 statement, Edwards stated, "I don't know if I'd recognize the man again." Further, he conceeded that shortly after the shooting, he saw Barefoot on television, and in newspaper photographs (R. 1208) Edwards was shown a photograph of Barefoot on October 24, 1978, shortly before the trial began (R 1215). In spite of these glaring inconsistencies, Edwards "positively" identified Barefoot in the Courtroom, placing him near the scene of the fire, running toward the area where the shooting occurred.

2. MICHAEL THRASH:

a. DIRECT: Thrash, another soldier stationed at Ft. Hood lived in a trailer park on Amy Lane and was walking toward Highway 190 to catch a ride to the post around five in the morning. Thrash saw the shooting. Although apparently half a block away when the fatal shot was fired, and even with the policecar spotlight hitting the "killer" in the face, he was unable to make an in-court identification of Barefoot as the killer although he gave a description of the man. Thrash was impeached on cross examination when questioned about the discrepancies between his in court description of the killer, and the description given to the police just hours after the shooting:

b. Impeachment of identification testimony:

1) IN COURT: DIRECT

a) Height 5'6" -6'

b) Weight 160-185 lbs.

c) Blue jeans, t-shirt

2. CROSS(prior statement, at R 1255)

a) Tall, 6 foot

b) Military haircut, short enought to see ears.

c) Big, 185-190 lbs

d) Didn't know color of T-shirt

Thrash ran after the killer down Valley road, and after going about half way, stopped and turned back to see if he could help the wounded officer. He saw another man standing in a front yard (1255).

3. CONSUELO MATAMOROS:

DIRECT: Mrs. Matamoros lived at 104 Valley Road and after hearing her dogs bark, looked out the back of her house and saw a man run in her back yard. He stopped and waited while the police car went by. He had rusty colored hair. She heard no gunshots. She could not identify the man.

Cross examination: Her testimony was basically the same. No identification of Barefoot was made and no physical description of the running man in her back yard other than he had rusty colored hair.

4. MARY RICHARDS: (Trial testimony)

DIRECT: Mrs. Richards lived at 111 Valley Road across from Mrs. Matamoros, between Amy Road and Ann. Awake at 5 to 5:30 that morning, she heard a shot. Her bed was against a window facing Valley Road. When she said she heard a second shot, the prosecutor cut her off (R 1263) changing the subject. She saw a man running from Amy down Valley Road, passing right in front of her just three car widths away. She saw him clearly, from the side,

under the street light.

In Court: Direct and Cross

a) The man was about 5'6" tall

b) Smooth face

c) Wearing white T-shirt, neat and clean

d) Grey pants

e) Hair longer in back than front, like it had been styled once, but I couldn't see his ears...DEFINITELY NOT A MILITARY HAIRCUT.

d) Barefoot "resembles" the man running when the shots were fired.

Mary Richards placed Barefoot at the scene of the shooting, by description, and tentative in-court identification. The only other witness to the shooting, Michael Thrash could not identify Barefoot in court, but could give a physical description of the "killer". Thrash's description of the killer given hours after he witnessed the shooting, was not consistent with the man described by Mary Richards in trial. It is, however, the same man described in Mary Richard's deposition.

4. JOHN HERNANDEZ: Direct and Cross

Hernandez, met Barefoot for the first time on the streets of Kileen between 9 and 10 a.m. on August 7, 1982, about three and a half to four hours after the shooting. After spending the whole day and night with Barefoot and seeing him off on a bus to Houston, Hernandez called the police. Barefoot had told him that the police were looking for him [Barefoot] for a killing "I didn't do"(R).

Hernandez described Barefoot for the police:

1. Barefoot had a moustache 4 hours after the shooting. He was not clean shaven until the following day.

2. Barefoot had medium length brown hair, not red, not a military haircut; not styled hair.

3. Barefoot was about 5'6" tall, not 6 feet tall.

4. Barefoot was wearing jeans and a brown t-shirt.

5. Barefoot weighed between 135-140 lbs, not a big built man weighing 180-190 lbs.

6. Barefoot did not have a gun. Hernandez, an admitted homosexual, testified that he made advances toward Barefoot that were refused, but that he got close enough to know there could not have been a gun in his pocket.

Edwards, Thrash, and Richards all made a big point in their description of the killers hair. Not one mentioned the blue denim cap with the GMC logo on it Barefoot was wearing when Roberson (R 1570) allegedly dropped him off at the Seven-eleven, and that that he was wearing when he allegedly returned to the trailer splattered with blood. Two "biased" witnesses testified against Barefoot. Robert Roberson, an accomplice as a matter of law as and whose testimony required independent corroboration, Article 43.06, V.A.P.C., Texas Penal Code, and Donnie Ray Tiller, a known dope addict and dealer, and police informant, currently taking "speed" without interference from local law enforcement officials.

The bulk of Tiller's testimony involved Barefoot's alleged predictions about robberies and killing an oriental looking police officer from Harker Heights because [he] "had roughed him [Barefoot] up during an arrest for public intoxication(1412). Barefoot supposedly told Tiller [he] would read about [Barefoot] in the news for killing a Harker Heights cop. In mid June, 1978, Barefoot "detailed" plans to Tiller about robbing the Oasis Club (1414) after burning a building to create a diversion (1416). Barefoot didn't have a gun but was always asking Tiller for one. When the full plans for the arson, killing and robbery were laid out, both [Tiller and Barefoot] were comiong off speed (1418). Tiller last saw Barefoot about 4:30 p.m. on the 6th of August. Tiller refused to give Barefoot a ride to his girlfriend's house because he was out of gas, but drove Roberson to work half an hour later.

Tiller and Roberson both worked for Yellow Cab in Kileen. Roberson finished his shift at 4 a.m., on Sunday morning, August 7, 1978 and drove off in a 1966 blue Chevy Impala station wagon. The next thing he heard was the six o'clock news reporting the shooting of the Harker Heights police officer.

Tiller claims he received a telephone call from Barefoot about 10:45 a.m. on August 7, 1978 admitting "I shot him in the head." Tiller said he called Carl Trippet at 11. Carl Trippet said he called Tiller at 9 a.m.

John Hernandez was with Barefoot from about 9 a.m. on the morning hours after the shooting. Barefoot didn't brag. He denied being the killer, although he told Hernandez that he knew they [police] were looking for him for a killing he didn't do.

Tiller said Barefoot had a .32.caliber pistol. A man named "Billy Mack" never further identified to any degree helped Barefoot plan the arson and robbery.

Tiller did nothing to stop the planning or execution of these plans to break the law (1420). He had previously been charged with a burglary but got "cut loose" because he told the police that his roommates were the real robbers (1436) and had cooperated with the police on a couple of other occasions (1436).

Robert Roberson, the Accomplice as a matter of law, was a former "military" man, stationed at Fort Hood. He had been discharged about eighteen months before the shooting (R 1497). Roberson, Tiller and Barefoot lived together in a trailer with two prostitutes (R 1505) He met Darren Callier, aka Barefoot when he tried to sell him some speed in June, 1978. They began living together. Barefoot's contributions to the living expenses was sharing speed he bought and buying groceries, "same as paying rent." (1509). Barefoot didn't have a car. (R 1510).

Roberson testified on direct that Barefoot only talked in general about a "couple of jobs he's like to pull if he needed some quick money."(1512).

Roberson worked for Yellow Cab. His usual hours were four in the afternoon to four in the morning. He didn't see Barefoot on Sunday, August 6, 1978. Roberson got off work about 4:15 a.m. on August 7, 1978. He drove to the trailer in the blue chevy station wagon and got to bed with Debbie (R 1516) when Barefoot burst in saying "[he] just had to go and do something...[he] had to go to Harker Heights (1518). Roberson took him. They left the trailer about 4:50 in Kileen and headed for Harker Heights in Tiller's car (1519). Roberson said Barefoot had a bomb, an empty milk jug, and a .25 caliber loaded pistol. Roberson checked it himself so he knew it was loaded (1520).

Roberson told the jury that Barefoot was going to burn down Joe's place because Joe wanted the insurance money (1523). Roberson and Barefoot bought the gasoline and put it in the milk jug. Roberson claimed that he then "abandoned" Barefoot and returned to the trailer taking the bomb with him that Barefoot left in the car (cf: Gerhard's affidavit).

Roberson, said Barefoot was going to burn the Silver Spur but he wouldn't drive him there because he didn't want to get get involved (R 1527). The trial court, however, charged the jury the Roberson was an accomplice to the arson and, under the Texas law, a party to the offense of capital murder.

Roberson testified that he was back at the trailer and in bed by five minutes after five, and the next thing he knew the police were at his door (1529) looking for Darren. Roberson wasn't sure what time the police came by the first time or how

they happened to be looking for Darren in the first place. Roberson said Barefoot returned to the trailer around nine o'clock (cf: Hernandez testimony) and that he was "nervous and had red splotches on him". Barefoot changed clothes. He told Roberson that the police were looking for him because he had wasted a copy (1533) and he demonstrated for Roberson just how he did it. The white T-shirt was left in the trailer but never turned over to the police or found in a police search of the trailer some time later. Roberson said he didn't see the gun again. Roberson did note that Barefoot was still wearing his hat, and did have a mustache(1537) when he returned to the trailer after the shooting. Roberson didn't call the police so he wouldn't get involved (1538). Roberson put the bomb in a dumpster at Gibson's. He never gave it to the police or told them where it was. The police came to see Roberson a couple of more times and on August 8, 1978, he gave them a written statement after being apprised of his constitutional rights. (1540)

On cross-examination, Roberson told the jury that his trailer burned about a month after the shooting and he lost his job with yellow cab and didn't see any point in getting another since he's have to take off work to come back and testify (1545). Roberson admitted that his drug habits often had him high on speed for five or six days (1555) at a time. Barefoot was nicknamed the "pet" because he followed everyone around and kept house for them. He said the reason Barefoot hadn't been working probably was because he couldn't due to an infection on his wrist after an on job injury. On the 6th or 7th of August, 1978, Roberson admitted that he had been up for about three days straight, speeding (1567).

Roberson said Barefoot didn't mention anything about a robbery (1577). Roberson described Barefoot to Officer Kolrudis when they came to the trailer: "5'6" tall, with long red hair down to his nect, and he had a mustache and he was short and stocky."(1579)

On August 8, 1978, Roberson gave a written statement to the Harker Heights police. Roberson's trial testimony differed in the following material respects from his written statement: (1585-1587)

1. In his written statement he said he didn't know the caliber of gun Barefoot had
2. He didn't tell police that Barefoot had reburned to the trailer at nine o'clock the morning of the shooting.
3. He didn't tell police that Barefoot admitting shooting anybody.
4. He didn't tell the police that Barefoot had changed his clothes.
5. He didn't tell police anything about a bomb.
6. He obviously forgot about the hat Barefoot left and returned with, the blue denim hat with the GMC logo.

The above testimony was either disregarded or overlooked, becsuse of time limitations, by the Court of Appeals. It bore directly upon the question that should have been considered by the Court: was there a substantial question that required the Court of stay the execution pending determination of the appeal. Where the basic allegation, raised by Richards' sworn testimony, is prosecutorial misconduct, any equity considerations should clearly be resolved in the petitioner's favor. The test used by the Court, and advocated by the respondent, that the matter should be resolved on the merits at the Stay proceedings, was erroneous and was itself a violation of due process of law.

The United States District Judge who decided the habeas corpus proceedings below, and who issued a certificate of probable cause and permitted petitioner to appeal in forma pauperis, has ordered an evidentiary hearing for 1:30 p.m. on Monday, January 24, 1983. This fact alone should carry some weight with this Court and demonstrate the fundamental inequity of the procedure used by the Court of Appeals.

The necessity for such a hearing is demonstrated by petitioner's Exhibit "A", attached hereto, a copy of the notes made by the investigator for defense counsel after his interview with Mary Richards. This statement, if presented at an evidentiary hearing, would clearly refute the holding of the Court of Appeals that "if she had told everybody and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense." The exact opposite will be shown at an evidentiary hearing by the testimony of both the investigator and defense counsel.

The statement of Robert Gerhard, attached hereto as Exhibit "B", raises further issues as to whether or not petitioner was the trigger man in this cause, a fact that would have great weight on a determinatin of punishment. The facts present a plausible hypothesis that Robertson, rather than petitioner, was the killer.

The foregoing cursory examination of the record clearly demonstrates that the Court of Appeals erred in each of the seven conclusions upon which it based it denial of the Motion to stay petitioner's execution.

CONCLUSION AND PRAYER

This case is a prime example of the dangers inherent in

the present practice of short circuiting the usual due process safeguards in the interest of speedy executions, regardless of the irrevocable consequences of such restricted procedure. The appellant who seeks monetary damages, or relief from a term of imprisonment receives the full panoply of federal safeguards and full rights of appeal. Not so for a person convicted of capital murder.

The petitioner, Thomas A. Barefoot, prays that the Court, based upon his original motion for stay of execution and this supplemental motion, stay his execution, scheduled before sunrise on January 25, 1983, pending determination of his appeal; the issues of first impression raised by his petition for writ of habeas corpus; and the conflict between two United States District Courts in Texas.

Petitioner prays that this Court stay his execution and set aside the order of the Court below.

Respectfully submitted

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Petitioner's lawyers

DETECTIVE INVESTIGATOR RAY GARRISON'S NOTES OF INTERVIEW WITH MARY RICHARDS
DATED 11/11/78

"I interviewed Mrs. Mary Richards, 111 East Valley Road, Harker Heights, Texas, at the Oasis Club, Harker Heights, Texas, at about 7:20 p.m. this date

"Mrs. Richards says that she had rather not talk to me or Barefoot's attorneys unless it was at a meeting with the D.A.'s personnel present.

"She stated that she had better tell everyone again at the same time that she usually get up at between 5:30 a.m. and 6:00 a.m. every morning;
that she was awake at about this time on the morning of August 7, 1978;
that she was startled when she heard a sound like a gunshot;
that she remembers thinking it was a gunshot when she heard the second shot;
that her bedroom window faces Valley Road;
that a window pane was broken from the window so she poke her head out the window, almost to the window screen;
that she saw a man hurrying along Valley Road going West;
that she thought at the time, maybe someone has been shot and the man was going for help;
that because she saw him, she made a close facial study of the man;
that she studied the man's build and facial features as he passed in front of four houses across the street;
that she started to say "hey" to him a couple of times so that she might see a frontal view of his face;
that the street light in front of her house was on;
When the undersigned attempted to question her with reference to clothing worn by the man, she stated she'd rather describe that at the meeting.
She added that she did not know Barefoot;
that she had never seen Barefoot;
that she thought or felt sure that she could identify the man she saw on August 7, 1978, if she saw him again and added that if she was not sure, she would not say that Barefoot was the man. She kept repeating that she would not identify the wrong person. "

_____
RAY GARRISON

Investigator's Note: This will be a strong witness for the State. She apparently has her story together and her statement should be obtained by the D.A.'s office by Attorney Brown and Blyte. Very cooperative witness. She has been served to appear in the courtroom.

EXHIBIT "A"

STATE OF TEXAS
COUNTY OF BRAZORIA

My name is ROBERT GERHARD, I am an inmate at the Texas Department of Corrections, ~~Ramsey~~ Darrington Unit. I am serving a fifteen year sentence for Burglary.

I witnessed a shooting that occurred in Harker Heights, Texas outside a Western night club. I was driving by the club late at night with a friend JOSHUA COCHRAN, when I heard a shot. There could have been more shots, I don't recall. After I heard the shot, I saw two white males in the parking lot of the club. I pulled my car over & saw one of the men get ~~back~~ into a car. I don't remember the type of vehicle, but this man was standing outside the vehicle when the shooting occurred.

The man who got into the car was 5'10" to 6'0" tall, ~~stright~~ slender built, with a clean shaved face. I don't recall the length or color of his hair. I stayed there for about five minutes or less, until I saw the police arrive. As the police drive up, I drove off & this is the last time I saw the man in the car. During this time I was about 50' to 60' ~~feet~~ from the man in the car.

BEFORE ME, this the 20th day of January, 1983, personally appeard ROBERT GERHARD, who after being duly sworn by me, stated that the above statement is true & correct to the best of his knowledge & belief.

my commission expires 7-15-84

NOTARY PUBLIC IN & FOR BRAZORIA CO. TEX

EXHIBIT "B"

CERTIFICATION-

I certify that I mailed two copies of this Supplemental Motion for Stay of Execution was mailed to postage prepaid to: Mr. Douglas Becker, Assistant Attorney General of Texas, Supreme Court Building, P. O. Box 12584, Austin, Texas, 78711, on January 21, 1983.

Will Gray